

STATE OF MICHIGAN
COURT OF APPEALS

REBECCA WICKLUND-BURGESS,

Plaintiff-Appellant,

v

YMCA OF DETROIT, d/b/a FARMINGTON
AREA BRANCH OF METROPOLITAN
DETROIT,

Defendant-Appellee.

UNPUBLISHED

September 26, 2000

No. 208339

Oakland Circuit Court

LC No. 95-489578-NO

Before: Kelly, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from a judgment of no cause of action in favor of defendant, based on a jury's determination that defendant was not negligent. We affirm.

Plaintiff first claims that the trial court erred by improperly restricting its voir dire examination of replacement jurors. MCR 2.511(F) provides that, after a juror is excused for cause or peremptory challenge, "another juror must be selected and examined before further challenges are made." The scope of the voir dire is within the discretion of the trial court and its decision will be set aside only if there is an abuse of that discretion. *White v Vassar*, 157 Mich App 282, 289; 403 NW2d 124 (1987). An abuse of discretion occurs when the trial court's voir dire is "so limited as to exclude a showing of facts that would constitute grounds for challenging for cause or the reasonable exercise of peremptory challenges." *Fedorinchik v Stewart*, 289 Mich 436, 439; 286 NW 673 (1939). Accord *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994).

While the trial court's questions posed to the replacement jurors were brief, plaintiff has not demonstrated that the voir dire, examined in conjunction with the information available from questionnaires, was so limited that it excluded a showing of facts constituting grounds for a challenge for cause or a reasonable exercise of peremptory challenges. *People v Lambo*, 8 Mich App 320, 326; 154 NW2d 583 (1967). See also *Citizens Commercial & Savings Bank v Engberg*, 15 Mich App 438, 440; 166 NW2d 661 (1968). It is apparent from the record that the replacement jurors

understood the court's questions as going beyond a mere request for a self-assessment of bias. Hence, plaintiff has not shown an abuse of discretion.

Plaintiff next claims that the trial court abused its discretion in allowing one of defendant's witnesses to provide expert testimony when he was not previously identified as an expert on defendant's witness list. We disagree. "The decision whether to allow a party to add an expert witness is within the discretion of the trial court." *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). Witness lists are an element of discovery, which are intended to avoid "trial by surprise." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). A number of factors, including notice of the witness and prejudice, should be considered by a trial court when deciding whether to allow such a witness. See *Colovos v Dep't of Transportation*, 205 Mich App 524, 527-528; 517 NW2d 803 (1994). However, the dispositive issue on appeal is whether the record reveals an abuse of discretion. See, e.g., *North v Dep't of Mental Health*, 427 Mich 659, 661; 397 NW2d 793 (1986). Given the circumstances presented to the trial court, we conclude that its decision to allow the witness to provide expert testimony, but to disallow defendant from introducing the witness' deposition in lieu of live testimony, was a proper exercise of discretion.¹

Plaintiff next argues that the trial court should have disqualified itself and that its failure to do so deprived her of a fair trial. We disagree. Plaintiff's claim that disqualification was warranted under MCR 2.003 was not preserved because the requisite procedure for disqualification, including the requirement that the motion be referred to the chief judge, was not followed. *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). Plaintiff's alternative claim that disqualification was warranted under the Due Process Clause is not properly before us because it was not presented to the trial court. Although this Court may review an unpreserved constitutional issue where no question of fact exists and the interests of justice and judicial economy so dictate, *Great Lakes Division of National Steel Corp v Ecorse*, 227 Mich App 379, 426; 576 NW2d 667 (1998), the due process standard for disqualification is not easily met. *Cain v Dep't of Corrections*, 451 Mich 470, 514; 548 NW2d 210 (1996). Based on our review of the lower court record and the additional materials filed by plaintiff pursuant to this Court's prior order, we conclude that plaintiff has not shown a due process basis for disqualification. *Cain, supra*.²

¹ Although plaintiff also argues that there was no evidence to support the witness' opinion, we decline to address this claim because it was not raised in the statement of the issue presented. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

² We note that the specific claims raised by plaintiff regarding the trial court's conduct fall squarely within the scope of the motion for mistrial that was presented to the trial court. However, plaintiff's failure to brief the merits of the court's decision on that motion constitutes an abandonment of the issue. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). If we were to assume that plaintiff's argument as one embracing the motion for mistrial, we would conclude that the trial court did not abuse its discretion in denying the motion. *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d

(continued...)

Finally, plaintiff claims that the trial court erred in denying her motion in limine to strike the reference in an incident report, prepared by defendant, to an "Act of God" as being the cause of plaintiff's fall. Because plaintiff did not make an offer of proof at trial to introduce the exhibit in any form, or to otherwise establish a foundation for the exhibit (e.g., that it was admissible under the hearsay rules, MRE 801 *et seq.*), we conclude that her substantial rights were not affected by the trial court's ruling. MRE 103.

Further, we conclude that the trial court did not abuse its discretion in denying the motion to strike on the grounds raised by plaintiff. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The trial court's refusal to strike the "Act of God" statement from the incident report was justified under the rule of completeness. *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990).

Affirmed. Defendant, as the prevailing party, may tax costs under MCR 7.219.

/s/ Michael J. Kelly

/s/ Donald E. Holbrook, Jr.

/s/ Richard Allen Griffin

(...continued)

773 (1992). Plaintiff has not shown that the trial court was unable to exercise fair judgment, *Schellenberg v Rochester Lodge No. 225*, 228 Mich App 20, 39; 577 NW2d 163 (1998), or pierced the veil of judicial impartiality.